Supreme Court, U.S.
FILED
JUL 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 87-2085

In The
Supreme Court of the United States
October Term, 1987

ARKANSAS STATE BOARD OF EDUCATION, ET AL.,
Petitioners,

v.

LITTLE ROCK SCHOOL DISTRICT, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LITTLE ROCK SCHOOL DISTRICT'S BRIEF IN OPPOSITION TO CERTIORARI

CHRISTOPHER HELLER
FRIDAY, ELDREDGE & CLARK
2000 First Commercial Building
Little Rock, Arkansas 72201
(501) 376-2011

Counsel for Respondent
Little Rock School District

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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REASONS FOR DENYING THE WRIT

I.

There Is No Conflict Among the Circuits Which Warrants Review By This Court

The decision of the Eighth Circuit Court of Appeals in this case can be reconciled with the decision of the Sixth

Circuit Court of Appeals in *Kelley v. Metropolitan County Board of Education,* 836 F.2d 986 (6th Cir. 1987), *cert. denied,* 56 U.S.L.W. 3864 (June 20, 1988). Given the facts which were presented to the Eighth Circuit Court of Appeals in this case, the Sixth Circuit panel which decided *Kelley* might well have rendered a decision very much like the decision below. The critical factual differences between this case and *Kelley* resulted in decisions which are different, but not in conflict "on the same matter". Supreme Court Rule 17.1.

The Arkansas State Board of Education (State Board) was an original defendant in this case. Petition, p. 4; *Little Rock School District v. Pulaski County Special School District,* 778 F.2d 404, 408 (8th Cir. 1985). In contrast, the State of Tennessee was sued in *Kelley* "some 26 years after the start of the lawsuit". *Kelley,* 836 F.2d at 987.

The State Board was determined to be a necessary party to this case (*Little Rock School District v. Pulaski County Special School District,* 584 F. Supp. 328, 353 (E.D. Ark. 1984); *Little Rock School District v. Pulaski County Special School District,* 597 F. Supp. 1220, 1227-28 (E.D. Ark. 1984)) and did not appeal that determination (*Little Rock School District v. Pulaski County Special School District,* 778 F.2d 404, 407-09 (8th Cir. 1985)). The State of Tennessee, on the other hand, immediately asserted the defense of sovereign immunity. *Kelley,* 836 F.2d at 988. If the defense of sovereign immunity had not been raised during the liability phase in *Kelley,* as it was not raised by the State Board during the liability phase of this case, the result in *Kelley* probably would have been different. In cases where the defense of sovereign immunity was not

raised, the Sixth Circuit has affirmed "judgments ordering state defendants to share in the payment of school integration costs." *Id.* at 995 n. 4.

Little Rock School District students remain active parties in this case and further hearings will be held to determine the full scope of the required remedy for those students. *Little Rock School District v. Pulaski County Special School District,* 839 F.2d 1296, 1308 (8th Cir. 1988). The situation was quite different in *Kelley:*

> It bears emphasis that we are not here called upon to adjudicate the rights of plaintiff's suing to obtain the equal educational opportunities promised them in *Brown v. Board of Education.* Those plaintiffs have long since won their case. They won it without ever having asserted a claim against the state. They are already receiving—through decrees that do no violence to the principle of sovereign immunity—the full measure of relief to which they are entitled under the Constitution.

836 F.2d at 989-90 (citation omitted).

Three separate parties to this case contend that the State Board must participate in the remedy required by the Eighth Circuit. Those parties are: Black LRSD students represented by the Joshua intervenors; LRSD teachers represented by the Knight intervenors; and LRSD itself. The *Kelley* case was decided on the basis of a belated claim brought "solely in its own right" by a political subdivision which had been "an active participant in the same wrongs on which it base[d] its claim for indemnification". *Kelley,* 836 F.2d at 998.

This case, unlike *Kelley,* is not just about money. The district court's remedial order in this case plainly said

that the State Board would have "financial and oversight responsibilities". *Little Rock School District v. Pulaski County Special School District*, 597 F. Supp. 1220, 1228 (E.D. Ark. 1984). The Eighth Circuit Court of Appeals has held that the State Board must "participate in funding the compensatory, remedial and quality education programs, in establishing and maintaining the magnet schools, and in monitoring plan progress".

The State Board's responsibility to establish, maintain, monitor and oversee portions of LRSD's desegregation plan clearly distinguishes this case from *Kelley*. Tennessee was joined in *Kelley* "solely to permit one sometime constitutional wrongdoer to recover monetary compensation from another". *Kelley*, 836 F.2d at 990.

The district court has vividly described the notorious actions taken by the State of Arkansas to oppose all efforts to desegregate the Little Rock schools. *Little Rock School District v. Pulaski County Special School District*, 584 F. Supp. 328, 330-34 (E.D. Ark. 1984). The Court of Appeals affirmed those findings and said:

> [A]lthough the Little Rock Board of Education announced shortly after *Brown I* that it would begin to desegregate its schools by 1957 and complete the process by 1963, the active intervention of the state was a central factor in delaying desegregation of Little Rock schools until 1973, and in contributing to the increasing concentration of blacks in LRSD. The district court found that throughout this period and to this day, the state has never acknowledged its affirmative duty to assist local school districts in their desegregation efforts and has never promulated any rules or guidelines which would encourage the local school districts to eliminate discrimination in their school systems. Nor has it taken any action to foster racially neutral school siting. Rather, it has approved

> racially segregative school sitings in violation of district court decrees as recently as 1980.
>
> * * *
>
> To this day, the state takes the position that Arkansas law does not permit it to assist local school boards in their desegregation efforts.

778 F. Supp. at 417. These findings were made during the liability phase of this case and are no longer subject to review.

The district court finding in *Kelley* that Tennessee was a constitutional wrongdoer was reviewed by the Sixth Circuit. *Kelley*, 836 F.2d at 993. The Sixth Circuit panel "searched the record in vain for any demonstration that integration of metropolitan Nashville's schools has been wrongfully impeded by anything the state has done, or has failed to do, in the 1970s or 1980s." *Id.* While the State of Arkansas has not yet discharged its affirmative duty to effectuate a transition to a racially non-discriminatory school system, Tennessee's "duty in this respect was discharged long before Metro filed its third-party complaint" in *Kelley*. *Id.* at 994.

Because of the factual differences between this case and *Kelley*, the Eighth Circuit is not in conflict with the Sixth Circuit. The facts of this case bring it clearly within the rationale of *Milliken v. Bradley*, 433 U.S. 267 (1987) (*Milliken II*) while the facts of *Kelley* leave it well outside the scope of *Milliken II*.

The Eleventh Amendment does not prohibit a federal court order enjoining state officials "to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Mil-*

liken II, 433 U.S. at 289, citing *Edelman v. Jordan*, 415 U.S. 651, 667 (1974). The Eighth Circuit order at issue here simply requires state officials who have been held responsible for unconstitutional conduct to participate in the funding and oversight of compensatory educational programs as part of a desegregation plan which will operate prospectively to bring about the delayed benefits of a unitary school system. That order is clearly appropriate under *Milliken II*. 433 U.S. at 289-90.

The Sixth Circuit in *Kelley* also employed a *Milliken II* analysis, but the Sixth Circuit's analysis was focused on facts which are distinct from those in this case and which required a different result. While Arkansas was guilty of recent and current constitutional violations, Tennessee's constitutional obligations had long been discharged. While Arkansas was an original defendant in this case, Tennessee was sued in *Kelley* as a third-party defendant long after liability had been determined. While Arkansas was required to participate prospectively in the funding and oversight of programs designed to bring about the benefits of a unitary school system in Little Rock, students in Nashville were already receiving the full measure of relief to which they are entitled under the Constitution. While students and teachers remain active litigants in this case seeking relief from the State Board, Tennessee was sued solely by its political subdivision. Most importantly, however, Arkansas has been required to participate in the establishment, funding, monitoring and oversight of the Little Rock School District's desegregation plan, and has even been allotted two representatives on the Magnet Review Committee which controls interdistrict magnet schools located in Little Rock (*Little*

Rock School District v. Pulaski County Special School District, 778 F.2d 404, 436), while the district court order challenged by Tennessee required nothing more than the payment of money.

The Eighth Circuit Court of Appeals in this case and the Sixth Circuit Court of Appeals in *Kelley* both recognized that *Milliken II* controls the determination of whether a state defendant should be required to participate in a school desegregation remedy. The results reached by the two circuits are different because of the very critical factual differences. The decisions are not conflicting.

II.

The State Board's Argument That State Constitutional Violators Cannot Be Ordered To Participate In A Desegregation Remedy Unless The Local School District Is Unable To Fund The Remedy Is Both Improper And Incorrect

The State Board contends that there is a conflict between the Sixth and Eighth Circuits "as to whether a state may be required to fund a local desegregation plan without a predicate showing that the local school board is incapable of funding the entire program". The State Board did not raise this issue in the Court of Appeals. This Court ordinarily does not decide questions not raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). The question is therefore not properly raised by the Petition. *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981).

The Sixth Circuit in *Kelley* did not require a determination that a local school district is unable to fund its desegregation plan as a predicate to state liability. That Court merely observed that *Kelley* was not a case in which

desegregation would be delayed or diminished if the state were not ordered to participate in the remedy. *Kelley*, 836 F.2d at 990. The purpose of that observation was to show that the contest between the parties was "a contest not about desegregation, but about money". *Id.*

There can be no conflict between the Sixth and Eighth Circuits on this issue because the Sixth Circuit's discussion of the issue is dicta and the Eighth Circuit has not yet had the opportunity to decide the issue. The decision below properly adheres to the well-settled principle that "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Milliken II*, 433 U.S. at 280; *see Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404, 433 (8th Cir. 1985).

III.

The Court Of Appeals Clarified But Did Not Improperly Expand The Remedy Against The State Board

The Court of Appeals held in 1985 that the constitutional violations found to have occurred in three Pulaski County, Arkansas school districts could be remedied by less intrusive means than countywide consolidation. *Little Rock School District v. Pulaski County Special School District*, 778 F.2d at 408. Those means included "improving the quality of any remaining nonintegrated schools in LRSD, providing compensatory and remedial programs for black children in all three school districts, . . . and requiring the State Board to participate in funding the compensatory, remedial and quality education programs,

in establishing and maintaining the magnet schools, and in monitoring plan progress." *Id.*

The Court of Appeals was aware that four particular schools were then racially identifiable and might remain so the following school year. It therefore ordered that certain state funded remedies be provided in those schools if they retained their racial identifiability. *Id.* at 485. The Court of Appeals did not say that the required state participation in funding compensatory, remedial and quality education programs would be limited to four schools or that the requirement would dissolve if those particular four schools were fully integrated.

The order now challenged by the State Board is merely a clarification of the 1985 order. The clarification was necessary because LRSD adopted a different student assignment plan as a part of its ongoing desegregation effort (*Little Rock School District v. Pulaski County Special School District*, 839 F.2d at 1306) and because the district court placed an overly restrictive interpretation on the 1985 decision (*Little Rock School District v. Pulaski County Special School District*, 659 F. Supp. at 366). The clarification is straightforward and simple:

> In using the phrase "all- or nearly all-black", it was our intention to provide comprehensive, remedial and compensatory programs in racially identifiable black elementary schools.

Id. This clarification neither misapprehends nor conflicts with the 1985 ruling "requiring the State Board to participate in funding the compensatory, remedial and quality education programs". *Little Rock School District*, 778 F.2d at 408.

The State Board nevertheless sought *en banc* rehearing by the Court of Appeals. Rehearing was denied without dissent. Petition, p. A-1. This is an indication that the judges who joined the majority opinion of the *en banc* court in 1985 intended the meaning reflected in the 1988 panel decision.

The State Board contends that the Court of Appeals should have deferred to the district court "with regard to the liability of the State" and employed a "clearly erroneous" standard of review. The "clearly erroneous" standard is applicable to questions of fact, not to questions of law. *Pullman-Standard v. Swint,* 456 U.S. 273, 287 (1982). The state liability question was not only a question of law, it was a question of law that had been decided by the Court of Appeals and remanded to the district court for action consistent with that decision. The district court was not free to enter an order inconsistent with the Court of Appeals' determination of the law. The clarification by the Court of Appeals was consistent with its previous opinion and not so great a departure from the accepted and usual course of judicial proceedings as to warrant review by this Court.

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CONCLUSION

For the foregoing reasons, Respondent Little Rock School District respectfully prays that the writ be denied.

Respectfully submitted

CHRISTOPHER HELLER
FRIDAY, ELDREDGE & CLARK
2000 First Commercial Building
Little Rock, Arkansas 72201
(501) 376-2011
Little Rock School District,

Respondent